IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1327 of 2001
With
CIVIL APPLICATION No.3323 of 2005
With
SPECIAL CIVIL APPLICATION No. 2380 of 2001
With
SPECIAL CIVIL APPLICATION No. 1326 of 2001
With
CIVIL APPLICATION No. 3322 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ECONOMIC TRADERS (GUJ.) LTD. & 1 - Petitioner(s)
Versus
UNION OF INDIA & 3 - Respondent(s)

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Appearance :

MR UDAY JOSHI FOR M/S TRIVEDI & GUPTA for Petitioner(s) : 1 - 2.
MR JITENDRA MALKAN for Respondent(s) : 1,
MR ASIM J PANDYA for Respondent(s) : 2 - 4.
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 21/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

Special Civil Application No.1327 of 2001.

1 By this petition under Article 226 of the Constitution of India, the petitioners seek the following reliefs :

> "(A) Your Lordships may be pleased to issue a writ of mandamus, or a writ in the nature of mandamus or any other appropriate writ, direction or order, directing the respondents Nos. 2 and 3 herein to forthwith return the following original DEPB licenses with verification reports as

contemplated under para 7.43 of Handbook of Procedure (Volume I) 1997-2002;

Sr.No.	DEPB Licence Number.	Date	Value of Licence in Rupees.
1	RAJ-2400897	18/02/2000	254863.00
2	RAJ-2400907	22/02/2000	121652.00
3	RAJ-2400940	24/02/2000	237533.00
4	RAJ-2400944	25/02/2000	193727.00
5	RAJ-2401065	24/03/2000	465793.00
6	2410000078	04/05/00	229151.00
7	2410000110	10/05/00	339245.00
8	2410000273	13/06/2000	322469.00
9	2410000495	31/07/2000	94367.00
10	2410000543	28/08/2000	39113.00
11	2410000555	28/08/2000	36987.00

Sr.No.	DEPB Licence Number.	Date	Value of Licence in Rupees.
12	2410000827	04/10/00	125188.00

(B) Your Lordships may be pleased to issue a writ of mandamus, or a writ in the nature of mandamus holding and declaring that the Customs authorities have no jurisdiction to verify the classification of exported goods and the rate of credit decided by the DGFT authorities for the DEPB licenses and that the action of the Customs authorities in seeking to verify such details in the present case is illegal and unauthorised;

(C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the respondents No. 2 and 3 herein to forthwith return the original 12 DEPB Licences Nos.RAJ-2400897, RAJ-2400907, RAJ-2400940, RAJ-2400944, RAJ-2401065, 2410000078, 2410000110, 2410000273, 2410000495, 2410000543, 2410000555 & 2410000827, with their verification reports and endorsement as per para 7.43 of the Handbook of the procedure (Vol.I) 1997-2002;

(D) That an ex-parte ad-interim relief in terms of paragraph (C) above may kindly be

granted;

(E) That any other and further relief/s as may be deemed just and proper in the facts and circumstances of the present case may kindly be granted."

2 The petitioner, a deemed limited company, is a Merchant Exporter recognised by the Ministry of Commerce, Government of India, as an Export House, and is inter-alia engaged in the business of exporting various engineering items like Forgings, Castings, Flanges, Diesel Engines, Diesel Engine Spare parts, etc. The petitioner company got manufactured from its supporting manufacturers various items such as Element, Cylinder Block, Piston complete, Forged Crankshafts, Cylinder liners, etc. and exported the same as a Merchant Exporter. It is the case of the petitioner that while doing so, it had followed the procedure prescribed under the provisions of the Customs Act, 1962 (the Act), EXIM Policy and other relevant legislations.

3 The petitioner, presented 30 shipping bills for export of goods under DEPB scheme under the provisions of Section 50 of the Act during the period of May,1999 to September,2000. The Customs Authorities after carrying out necessary verification and examination, permitted export of goods and finally assessed the shipping bills for export. Respondent No.2 – Joint Director General of Foreign Trade issued DEPB credits on the basis of the aforesaid shipping bills which were valid for a period of 12 months from the date of issue.

4 On receipt of the said DEPBs from the respondent No.4, the petitioner presented the same before the respondent No.3- Deputy Commissioner of Customs (Group VII), for verification of the details of export as given on the DEPBs in terms of paragraph No.7.43 of the Handbook of Procedures. It is the case of the petitioner that the Customs Authorities after carrying out verification in terms of the provisions of paragraph

No.7.43 of the Handbook of Procedures, were required to return the DEPBs to the petitioner, after which the petitioner could use the DEPB credit or transfer the said DEPBs. That, despite several requests to the concerned authorities of the Customs Department to do the needful at the earliest with regard to the DEPBs presented to them, no action was taken by the concerned respondents.

5 As the DEPBs are valid only for a period of 12 months from the date of their issuance, the petitioners have approached this Court by way of the present petition seeking a direction against respondents No. 2 and 3, to return the original DEPB licences with verification reports as contemplated under paragraph 7.43 of Handbook of Procedure (Vol.I) 1997-2002.

6 Heard Mr.Uday Joshi, learned Advocate appearing on behalf of the petitioners and Mr.Y.N.Ravani, learned Additional Standing Counsel appearing on behalf of the respondents.

7. Mr.Joshi has drawn attention to the provisions of the Export and Import Policy,1997-2002 (EXIM Policy) and more particularly to the provisions of paragraph 7.14 thereof which makes provision for “Duty Entitlement Passbook Scheme (DEPB)”. The learned Advocate had also drawn attention to the provisions of paragraph 7.43 of Part-II of Handbook of Procedures, which deals with the verification by the Customs Authorities of the details of exports, as given on the DEPB. It is contended that the Customs Authorities are only required to verify as to whether the details of the exports as given on the DEPB, are as per the records. It is submitted that the role of the officers of the Customs Department being limited to verification of details of export as given on the DEPB to ascertain as to whether the same are as per their records, the officers are not required to look into any other issues. Hence, the Customs Officers are not at all justified in withholding the DEPB licence by raising issues which are beyond their jurisdiction.

8 Mr.Y.N.Ravani supported the stand of the Customs Authorities and reiterated what is stated in the Affidavit-in-Reply filed on behalf of the respondents.

9 Section 5 of the Foreign Trade (Development and Regulations) Act,1992 provides that the Central Government may from time to time, formulate and announce, by Notification in the Official Gazette, the Export and Import Policy and may also, in the like manner, amend that policy. In the exercise of powers conferred under section 5 of the Foreign Trade (Development and Regulations) Act,1992 the Central Government has notified the Export and Import Policy for the period 1997-2002. The Duty Entitlement Passbook (DEPB) is an export incentive scheme contained in Chapter VII of the Export Import Policy,1997-2002.

10 Paragraph No. 7.14 of the EXIM Policy which provides for Duty Entitlement Passbook Scheme (DEPB) reads as

under :

> *"For exporters not desirous of going through the licensing route, an optional facility is given under DEPB. The objective of Duty Entitlement Passbook Scheme is to neutralise the incidence of Customs duty on the import content of the export product. The neutralisation shall be provided by way of grant of duty credit against the export product.*
>
> *Under the Duty Entitlement Passbook Scheme (DEPB), an exporter may apply for credit, as a specified percentage of FOB value of exports, made in freely convertible currency. The credit shall be available against such export products and at such rates as may be specified by the Director General of Foreign Trade by way of public notice issued in this behalf, for import of raw materials, intermediates, components, parts, packaging material, etc.*
>
> *The holder of Duty Entitlement Passbook Scheme (DEPB) shall have the option to pay additional customs duty, if any, in cash as well."*

Paragraph No.7.15 provides that the DEPB shall be valid for a period of 12 months from the date of issue.

11 Paragraph No.4.11 of the EXIM Policy provides that the Director General of Foreign Trade (DGFT) may, in any case or class of cases, specify the procedure to be followed by an exporter or importer or by any licensing, competent or other authority for the purpose of implementing the provisions of the Act, the Rules and the Orders made thereunder and the EXIM policy. That, such procedures

shall be included in the Handbook (Vol.1), Handbook (Vol.2) and in ITC (HS) and published by means of a Public Notice. Accordingly, in Handbook of Procedures (Part-II), the procedure in relation to Duty Entitlement Passbook has been set out.

12 Paragraph No. 7.38 of the Handbook provides that an application for grant under DEPB may be made to the licencing authority concerned in the manner laid down in the said paragraph.

13 “Licencing authority” as defined under paragraph No.3.29 of the EXIM Policy, means the authority competent to grant licence under the Act/Order.

14 Under Section 9 of the Foreign Trade (Development and Regulations) Act,1992, the Director General of Foreign Trade or an Officer authorised by him is empowered to grant or renew a licence to import or export such class or classes of goods as may be prescribed. Under sub-

section (4) of Section 9, the DGFT or the officer authorised under sub-section (2) are empowered to suspend or cancel any licence granted under the Act. “Licence” is defined under Section 2(g) to mean a licence to import and export including a customs clearance permit and any other permission issued or granted under the Act.

15 Paragraph No.7.43 of the Handbook of Procedures, Part-II which provides for verification by Customs reads as under :

> *“The licensing authority shall ensure that while issuing the DEPB, the Shipping Bill No(s) and date(s), FOB value in Indian rupees as per Shipping Bill(s) and description of export product are endorsed on the DEPB. Before allowing the imports against DEPB, the Customs shall verify that the details of the exports, as given on the DEPB, are as per their records.”*

16 The overall scheme of DEPB is that certain percentage of credit on the FOB value of exports made by an exporter are granted as per the rates specified and published by the DGFT. Thus, both, the export products as well as the rates against which credit is available are specified by the DGFT. For availing the facility under the

DEPB Scheme, the exporter is required to make an application in the prescribed form with the prescribed documents, to the licensing authority. The licensing authority would determine the FOB value in the manner prescribed and then apply the DEPB rate of credit on such FOB value and issue DEPB. While issuing DEPB, the licensing authority is required to ensure that the numbers and dates of the shipping bills, FOB value in Indian rupees as per Shipping Bills, and the description of export product are endorsed on the DEPB. The DEPB may be issued with 'transferable' or 'non-transferable endorsement', depending on whether the export proceeds have been realised. DEPB credit can be utilized for payment of customs duty on goods which are imported into India. Before allowing imports against the DEPB, the Customs authorities are required to verify that the details of exports, as given on the DEPB, are in accordance with their records.

17 On a plain reading of the scheme of the DEPB, it is

apparent that determination of credit under the DEPB falls solely within the domain of the licensing authority, namely the DGFT or the officer authorised by him, who are empowered to issue DEPB licence to the exporter. At the time of issuance of licence, the licensing authority determines the DEPB credit to which the exporter is entitled on the basis of the shipping bills and other prescribed documents submitted by the exporter. Under the scheme, the only function of the Customs authorities is as prescribed under paragraph No.7.43 of the Hand Book of Procedure, namely, to verify as to whether the details of exports as given in the DEPB are in accordance with their records. Thus, the role of the Customs authorities is limited to verification of the details on the DEPB, to ascertain as to whether they tally with their records, and nothing more. Once the licensing authority, on consideration of the application of the exporter, holds that the goods exported by the exporter are eligible for the benefit under the DEPB scheme, it is not open to the Customs authorities to sit in appeal against an order

passed by the licensing authority. The role of the Customs authorities is confined to verification of the correctness of the exporter's declaration regarding the description, quantity and FOB value of the export products and nothing more.

18 In the present case, it is not in dispute that pursuant to applications made by the petitioners seeking benefit of DEPB scheme in respect of goods exported by them vide 30 shipping bills, 12 DEPB licences came to be issued in favour of the petitioners. Thereafter, the same were forwarded to the Customs authorities for verification thereof, as required under paragraph No.7.43 of the Hand Book of Procedure (Part-I). Under Circular No.15/97 dated 3.6.97, the verification by the Customs authorities is restricted to the description, quantity and FOB value of the export product set out in the Shipping Bills. However, the Customs authorities, instead of causing verification of the DEPB licenses in terms of paragraph 7.43 and returning the DEPBs along with verification reports, have

withheld the same without assigning any reasons therefor. It is only in the affidavit in reply filed in response to the petition, that the Customs authorities, for the first time, have come out with a case that the goods exported by the petitioners are not properly classified under the DEPB and are not covered under any specific heading of DEPB and thus, are not entitled for DEPB credit.

19 It is not the case of the Customs authorities, either in the submissions made by the learned Counsel appearing on behalf of the department or in their affidavit in reply that there is any discrepancy in the description, quantity and FOB value of the export product upon verification from their records. The case of the Customs authorities is that the petitioners are not entitled to DEPB credit for their export products. When the DEPB licence has been issued by the licensing authority specifically holding that the petitioners are entitled to avail of the benefit of DEPB scheme in respect of their export products, the Customs authorities are not justified in questioning the validity of

the DEPB credit granted in favour of the petitioners. Once the licensing authority has held that the export product is covered under the DEPB scheme and has issued DEPB licence, it is not open to the Customs authorities to take a stand that the export product is not covered under the DEPB scheme. Such action on the part of the Customs, of questioning the entitlement of the petitioners to credit under the DEPB licence issued by the licensing authority is beyond the bounds of their authority, without jurisdiction and bad in law.

20 At this stage, it is necessary to take note of the fact that as and when the shipping bills were presented the Customs Authorities were duly empowered to assess and undertake such an exercise after taking into consideration the shipping bills presented before them at the time of export. Such an exercise consisted of classification of the goods, levying customs duty at an appropriate rate and thus discharging the duty which the Customs Authorities were required to discharge under the provisions of the Customs Act,1962. The stage at which the impugned

action is sought to be initiated is not the stage at which the Customs Authorities can undertake the exercise to classify the goods and after correct valuation assess the duty payable. Therefore, the entire action is based on a fallacious premise as to the powers which the Customs Authorities possess. In fact, it is the very same shipping bills which had been duly processed and assessed by the Customs Authorities which have been taken into consideration and DEPB credit worked out on the basis of FOB value in Indian rupees which forms the basis for the licencing authority to issue the DEPB credit and endorse the same as required by paragraph No.7.43 of the Handbook.

21 It requires to be noted that the view adopted by this Court has also been taken by Bombay High Court in the case of Pradip Polyfils Pvt.Ltd. Vs. Union of India, 2004(173) E.L.T.3(Bom.). Similar is the essence of the circular issued by the Department of Revenue, Ministry of Finance on 3/6/1997 being Circular No.15/97.

22. Reliance on behalf of the respondent authorities on the unreported judgment in case of Satyam Export Vs. Union of India rendered on 26/02/2003 in Special Civil Application No.6653 of 2001 and cognate matters does not carry the case of revenue any further. It is necessary to note that the question is primarily not about the interpretation of any provision of either the EXIM Policy or the Handbook, the question relates to availability or otherwise of jurisdiciton with the Customs Authorities viz., respondent Nos. 2 and 3.

23 In the result, the petition is allowed. The action of the Customs authorities in withholding the DEPB licences of the petitioners on the ground that their export products are not covered under the DEPB scheme is held to be without jurisdiction and authority of law. Rule is made absolute accordingly, with no order as to costs.

24 Though the controversy in the petition was in

relation to 12 DEPB licences, it is stated by learned Advocate for the petitioner that in so far as DEPB licences at Sr.Nos.10 & 11 of Annexure 'F' to the petition are concerned, the dispute no longer survives. In relation to the remaining DEPB licences, it is prayed on behalf of the petitioners, that the validity period of the said DEPB licences be extended for such period as may be deemed fit. As can be seen from the record of the case, the petitioners had moved an application being Civil Application No.8348 of 2001 seeking a direction against respondent No.3 to endorse the DEPB licences mentioned in Annexure “F” to the petition and to return the same to the petitioners and that respondent No.4 be directed to extend the validity of the said DEPB licences for a period of six months from the date of such validation. On 20/9/2001, this Court has passed an order on the said Civil Application in the following terms :

> *“2. Having heard the learned Counsel for the parties on the question of grant of interim relief, we direct that regardless of the fact of expiry of Duty Entitlement Pass Book (DEPB) Licence, the applicants be allowed to avail the total credit claimed to the tune of Rs.24,60,088/- as per Annexure-F at page 28 and 29 to the petition,*

however, subject to their furnishing Bank Guarantee for the entire credit which was given to the applicants after expiry of Licence".

25 However, it appears that despite the specific direction of this Court permitting the petitioners to avail of the total credit to the tune of Rs.24,60,088/- subject to furnishing Bank Guarantee for the entire credit which was given to the petitioners after expiry of the licence, the petitioners did not abide by the same. Instead, the petitioners moved an application being Civil Application No.7111 of 2005 seeking modification of the order dated 20/9/2001 to the extent that the petitioner be directed to furnish a Bank Guarantee for Rs.3,68,307.53 instead of Rs.24,60,088/- for availing of the benefit of the DEPB licence. The said application though filed in November,2001 was not moved for a period of four years till 2005. In the circumstances, the petitioners having chosen not to avail of the benefit of the relief granted by this Court in Civil Application No.8348 of 2001, the request for extension of validity period cannot be granted.

26 After the judgment was pronounced, the learned Advocate for the petitioners has sought permission to refer to and rely upon the decision of the Apex Court in the case of Sandip Exports Ltd. v. Union of India, 2004 (164) E.L.T.133 in support of the oral request to extend the validity period of the DEPB licences for such period as may be deemed fit by the Court. After hearing the learned Additional Standing Counsel appearing on behalf of the respondents and considering the said decision, it is found that the same is rendered in the context of the facts of the said case and does not in any manner carry the case of the petitioners any further. Moreover, it may be pertinent to note that the Apex Court has in paragraph 12 of the said decision observed as follows :

> *"12. Keeping in view the peculiar facts and circumstances of the present case and without creating any precedent and, to do complete justice between the parties, we deem it appropriate to direct the authority to extend the period of licence for a period of 3 weeks from the date of revalidation of the licence.(emphasis supplied).*

SPECIAL CIVIL APPLICATION No. 2380 of 2001
AND
SPECIAL CIVIL APPLICATION No. 1326 of 2001

1 By these petitions under Article 226 of the Constitution of India the petitioners primarily challenge the Orders-in-Original No.KDL/Dy.COMMR./GR-VIII/49/2000 dated 29/12/2000 and No.KDL/Dy.COMMR/GR.-VII/16/2000 dated 7.11.2000 respectively, passed by the Deputy Commissioner (GR.VII), Customs House, Kandla, and other consequential reliefs.

2 The facts of both the petitions being common, for the sake of convenience, the facts of Special Civil Application No. 1326 of 2001 are stated herein.

3 Between April 1999 to October 1999, the petitioner Company had exported various products through Kandla Port under 7 Shipping Bills which were finally assessed by the respondent No.3. On the basis of such finally assessed Shipping Bills, the respondent No.4 issued two DEPB licences in December,1999. The DEPB licences were

lodged with the respondent No.3 for verification in terms of paragraph No.7.43 of the Hand Book of Procedures 1997-2000. However, instead of returning the DEPB licences after verification thereof, the respondent No.3 issued an undated Show Cause Notice interalia calling upon the petitioners to show cause as to why the benefit of DEPB claimed and obtained by them should not be denied as the goods exported by them do not fall under the serial numbers as claimed by them and no DEPB rate was prescribed for the same.

4 Pursuant to the said show cause notice, the respondent No.3 passed an Order-in-Original dated 7.11.2000, holding that the petitioners are not entitled to DEPB benefits on export products covered under the Show Cause Notice and that, therefore, the DEPB credit of Rs.1,36,972.92 is denied.

5 It is the case of the petitioners that the role of the Customs authorities is limited to verification of details of

export as given on the DEPB licences as to whether they are as per their record and no more. That, once the respondent No.4, Joint Director of Foreign Trade has granted DEPB licences in the exercise of powers conferred upon him under the Export-Import Policy framed under the provisions of the Foreign Trade (Development and Regulation) Act, 1992, the Customs authorities at the time of verification of the DEPB licences in terms of paragraph No.7.43 of the Hand Book of Procedure cannot go behind the grant of DEPB licences and question the eligibility of the petitioners of the grant of such licences.

6. In response to the averments made in the petition the respondents have filed an affidavit-in-reply. In paragraph No.6 thereof it has been stated as under :

> *"6. So far as the role of the Customs authority under para 7.43 of the Exim policy is concerned, the same is very important and is not very limited as stated in the petition. When DEPB is presented to the Customs authority for verification as per para 7.43 of the Exim Policy Handbook Procedure, the Customs authority is entitled to look into the issue of valuation, classification, description etc. of the goods exported. If during this check-up/verification, it is found that the exported goods were wrongly*

described or classified, the Customs authority can deny the DEPB credit after determining the correct classification of the description".

Thus, it is the case of the respondent that during the course of verification the Customs Authorities can review the decision taken at the time of assessment as regards valuation, classification, description, etc. of the goods exported. That in case the authority comes to the conclusion that the exported goods were wrongly described or classified, the Customs Authority is empowered to deny the DEPB credit after determining the correct classification of the description.

7. This Court, by an order of even date passed in Special Civil Application No.1327 of 2001, has decided an identical issue. In the circumstances, for the reasons stated in order dated 21.12.2005 in Special Civil Application No.1327 of 2001, both the petitions are allowed. The impugned Orders-in-Original No.KDL/Dy.COMMR./GR-VII/49/2000 dated 29.12.2000 and

No.KDL/Dy.COMMR/GR.-VII/16/2000 dated 7.11.2000 respectively, passed by the Deputy Commissioner (GR.VII), Customs House, Kandla, are hereby, quashed and set aside.

8 By a common interim order dated 8.8.2001 passed in Civil Application No.8347 of 2001 in Special Civil Application No.1326 of 2001 and Civil Application No.8349 of 2001 in Special Civil Application No.2380 of 2001, this Court had in the facts and circumstances of the case directed that should the petitioners give Bank Guarantee in each of the two matters to the tune of the amounts mentioned in the operative part of the respective orders to the satisfaction of the Deputy Commissioner of Customs (Group VII), Customs House, Kandla within a period of four weeks from the date of the said order, the operation of the impugned orders shall remain stayed and the respondent No.3, Deputy Commissioner of Customs (Group VII), Customs House, Kandla, may complete the procedural formalities as contemplated in

Para 7.43 of the Hand Book of Procedure, Volume I, for the licence of the petitioners and return the same to the respective petitioners and thereupon the Joint Director of Foreign Trade, Rajkot, may extend the date of the licences, which have already expired, in accordance with law for a suitable period so that the licences can be used.

9 It is an accepted position, that the parties have complied with the aforesaid interim order. In the light of the fact that the petitioners have succeeded, the Bank Guarantees that may have been furnished by the petitioners in pursuance of the aforesaid interim order are required to be released. The respondents are accordingly directed to release the Bank Guarantees that may have been furnished by the petitioners pursuant to the order dated 8/8/2001 passed in the aforesaid Civil Applications within a period of eight weeks from today.

10 Rule is made absolute accordingly, with no order as to costs.

CIVIL APPLICATIONS No. 3323 & 3322 OF 2005.

Though both these Civil Applications have not been listed on the Board as the main petitions have been disposed of today the Civil Applications are taken up for hearing and disposal as the papers are available.

Both these applications seek fixation of early hearing of the main petition. By an order of the even date, both the main petitions have been finally adjudicated. In the circumstances, these Civil Applications do not survive and are disposed of accordingly.

Sd/- Sd/-
(D.A.Mehta, J) (H.N.Devani, J)

m.m.bhatt